

LETTER OPINION
98-L-117

August 25, 1998

Mr. Robert R. Peterson
State Auditor
Office of the State Auditor
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505-0060

Dear Mr. Peterson:

Thank you for your letter asking me whether a political subdivision may invest in what you termed an "investment pool" and, if not, whether a home rule political subdivision could modify its charter to allow investments other than those authorized by statute.

You described an "investment pool" as similar to a mutual fund. Several political subdivisions submit their money to a money manager, typically a bank, which places that money into a "pool." The bank then takes the money from that pool and invests it in investment vehicles allowed by N.D.C.C. § 21-06-07. You state the political subdivisions do not own identifiable securities, but rather have an allocated share of a pool of investments.

This office addressed whether N.D.C.C. § 21-06-07 allows similar investments in an August 11, 1994, letter opinion to Kent Reiersen. That opinion stated the statute's allowance of an investment in a "direct obligation of the Treasury of the United States or of an instrumentality thereof" did not include purchasing those securities through a broker who holds the securities in the broker's "street name." The opinion reached that conclusion based on the statutory requirement that the investment be in a direct obligation, rather than allowing indirect investment, such as through a broker holding the securities in the broker's "street name." 1994 N.D. Op. Att'y Gen. L-206.

The investment pool you describe has characteristics strikingly similar to those addressed in my August 11, 1994, letter opinion to Kent Reiersen. I am informed that the assets in the investment pool are invested by the manager and are held in the manager's name. Accordingly, pursuant to my opinion to Kent Reiersen, such an investment is not authorized under N.D.C.C. § 21-06-07. See also Letter from Assistant Attorney General Steven E. Noack to Robert W. Peterson (Oct. 9, 1986) (stating that money market mutual funds are

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not permissible investments for political subdivisions under N.D.C.C. § 21-06-07).

However, N.D.C.C. § 21-06-07 was amended in 1995 to allow a political subdivision to make investments not allowed at the time of my 1994 opinion. 1995 N.D. Sess. Laws ch. 242. Those investments now include, in addition to direct obligations of the United States, obligations insured or guaranteed by the United States, including bonds, treasury bills and notes. Other permissible investments include certain repurchase agreements, certificates of deposit, and obligations of the state. Id.

N.D.C.C. § 21-06-07 was not amended, however, to allow the type of investment you describe. During the Senate Political Subdivision Committee's consideration of House Bill number 1246, which made the above changes, Senator Judy DeMers proposed an amendment which would have allowed a political subdivision to invest in certain mutual funds. Hearing on H. 1246 Before the Senate Political Subdivisions Comm. 54th N.D. Leg. (March 2, 1995). The portion of that amendment that would have authorized certain mutual funds was removed by the committee prior to submitting the bill to the Senate with a "do pass" recommendation. Hearing on H. 1246 Before the Senate Political Subdivisions Comm. 54th N.D. Leg. (March 9, 1995).

Thus, a legislative committee considered but rejected allowing political subdivision investments in mutual funds. The legislative committee's rejection of mutual funds as an investment option indicates amendments to N.D.C.C. § 21-06-07 were not intended to include mutual funds. That is consistent with this office's previous opinions that a political subdivision may not make such investments. Accordingly, it is my opinion that the 1995 amendments to N.D.C.C. § 21-06-07 did not authorize investments by political subdivisions in mutual funds or related investment pools.

Your second question is whether a home rule political subdivision could modify its charter to allow investments other than those statutorily allowed. A home rule political subdivision may exercise powers not allowed under state law if: (1) the Legislature granted it that power; (2) the political subdivision included that power in its home rule charter; (3) the political subdivision properly implemented the power through an ordinance; and (4) the power concerns only local, rather than statewide, matters. See Litten v. City of Fargo, 294 N.W.2d 628 (N.D. 1980); Letter from Attorney General Heidi Heitkamp to Stephen M. McLean (Sept. 26, 1997).

In a June 26, 1996, letter opinion to R. Jon Fitzner, I considered whether a city could make an investment not provided for in N.D.C.C.

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§ 40-33-12(1). N.D.C.C. § 40-33-12 deals with a municipality's investment of surplus utilities funds. The opinion concluded a city could not make an investment not specifically provided for in N.D.C.C. § 40-33-12. 1996 N.D. Op. Att'y Gen. L-126.

That opinion went on to consider whether a city could allow such an investment if the city enacted a home rule charter which allowed the investment, along with appropriate implementing ordinances. N.D.C.C. § 40-05.1-06(2) gives a home rule city the power to "control its finances and fiscal affairs" The opinion interpreted that language to allow investments not otherwise permitted by state law, provided the city adopted an appropriate home rule charter and implementing ordinance. Inherent in that opinion is the conclusion that a city's investment policies are local, rather than state matters.

Statutes concerning powers of other home rule political subdivisions similarly grant them the power to "control [their] own finances and fiscal affairs" See N.D.C.C. §§ 11-09.1-05 (counties), 54-40.4-03(3)(a) (county-city home rule). Accordingly, if a political subdivision has adopted an appropriate home rule charter and implementing ordinance, it is my opinion that a home rule political subdivision may make investments not otherwise permitted by N.D.C.C. § 21-06-07, including the investment pool you described in your letter.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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